

No. 18398 ✓

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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JAMY CORPORATION, a California corporation,  
*Appellant,*  
*vs.*

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue, Los Angeles, California,  
*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

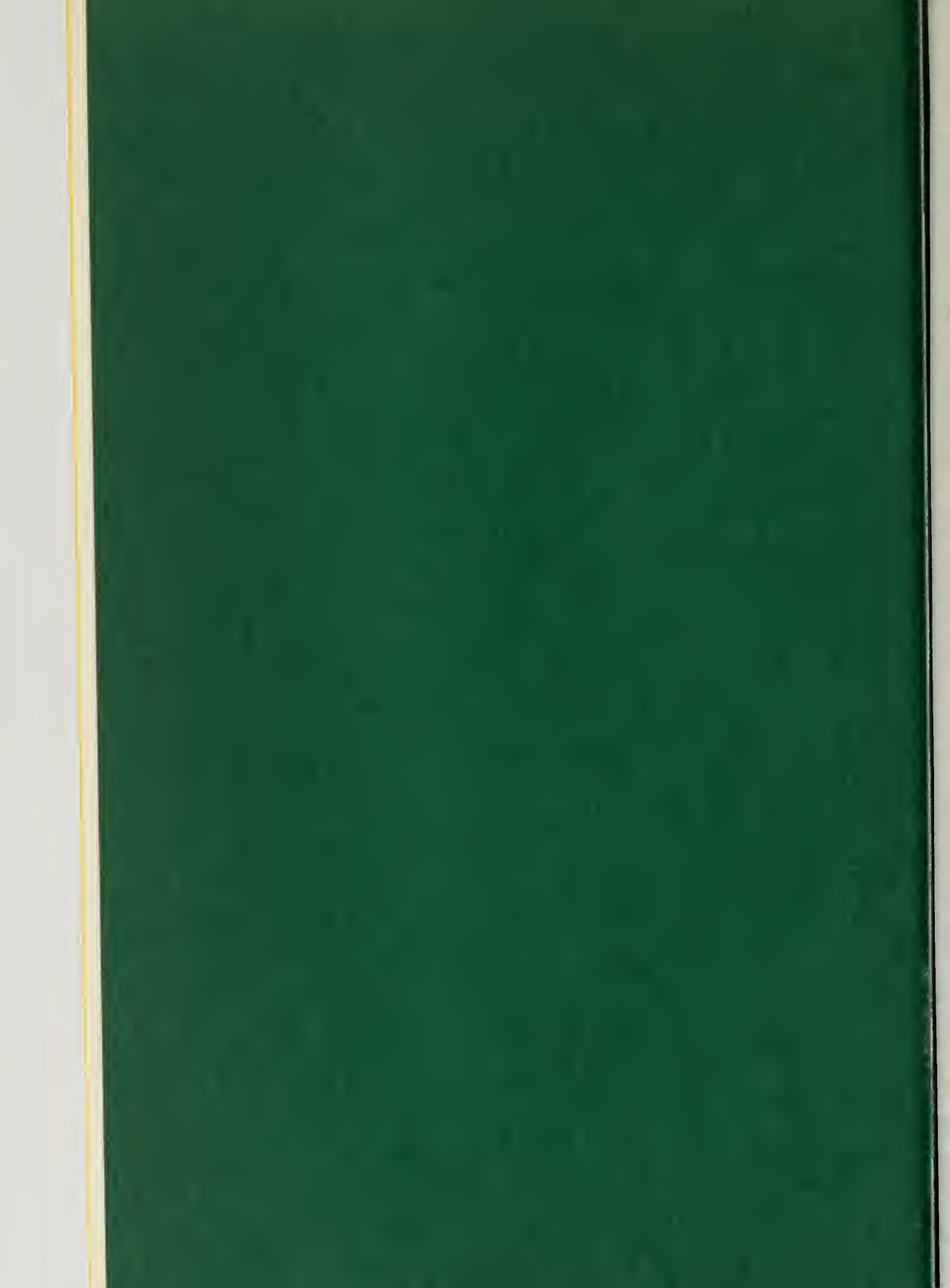
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FILED

JUN 26 1963

FRENK H. SCHMID, CLERK



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*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### Jurisdiction.

Appellant, a California corporation, commenced this action on November 23, 1962, in the United States District Court for the Southern District of California Central Division [R. 1]. This is an action, pursuant to the provisions of Section 6213 of the Internal Revenue Code, 26 U. S. C. A. § 6213 (1954), to enjoin the collection by appellee of asserted deficiencies in appellant's Federal income taxes for its two fiscal years ending August 31, 1956, and August 31, 1957, in the total amount of \$8,988.32 [R. 1-15]. Corporate Federal Income Tax returns for those two fiscal years had been duly filed by appellant in the office of appellee, District Director of Internal Revenue, Los Angeles,

California [R. 2]. The order and judgment of the United States District Court for the Southern District of California Central Division refusing any injunction and dismissing this action was entered on December 12, 1962, after a hearing on a motion by appellant for a preliminary injunction and prior to the filing of any answer or affidavit by appellee [R. 46, 49]. Notice of this appeal from that order and judgment of the District Court was duly filed on January 8, 1963 [R. 51]. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to the provisions of §§ 1291, 1292 and 1294 of the Judicial Code, 28 U. S. C. A. §§ 1291, 1292 and 1294.

#### **Statement of the Case.**

The following basic question is now before this Court:

Where no deficiency notice was ever issued by a District Director pursuant to the provisions of Section 6212 of the Internal Revenue Code, 26 U. S. C. A. § 6212 (1954), may that District Director avoid the injunctive provisions of Section 6213(a) of the Internal Revenue Code, 26 U. S. C. A. § 6213(a) (1954) and collect an asserted deficiency of Federal Income Tax assessed by the District Director under the provisions of Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954) (relating to receiverships) where a claim for such deficiency based upon such assessment and filed by the District Director in the subject receivership proceeding was never presented to, adjudicated by or allowed by, the Receivership Court?



This question has been raised in the following manner, as shown by the uncontradicted, verified allegations of the complaint [R. 1-16]: appellant, a solvent California corporation, duly filed income tax returns for its fiscal years ending August 31, 1956, and August 31, 1957, in the office of appellee at Los Angeles, California. The income tax liability assessed to itself in those returns has been paid by appellant. On April 27, 1959, the two stockholders of appellant were then married but were already involved in an action for their divorce. On that date, the wife commenced an action in the Superior Court of the State of California for dissolution of the appellant by reason of internal dissension and pursuant to California Corporations Code, Sections 4650, *et seq.* On May 20, 1959, the Court in that action for dissolution appointed a receiver for appellant. On November 9, 1959, appellee, pursuant to the provisions of Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954) made an immediate assessment of asserted income tax deficiencies for the fiscal years of appellant ending on August 31, 1956, and August 31, 1957, in the amounts of \$4,026.24 and \$4,962.08, respectively. On January 22, 1960, appellee filed in the receivership proceedings a claim, based upon those assessments of asserted deficiencies. This claim was never presented to, adjudicated by or allowed by, the Court in the receivership proceedings, or otherwise. On May 2, 1962, the receivership proceeding was terminated and the action for dissolution was dismissed by order of the Receivership Court. No appeal was ever taken by appellee in that action. No deficiency letter was ever issued by appellee to appellant pursuant to the provisions of Section

6212 of the Internal Revenue Code, 26 U. S. C. A. § 6212 (1954). On October 4, 1962, appellee advised appellant, for the first time, that appellee would attempt to collect the asserted deficiencies based upon the assessments previously made in the terminated receivership proceedings. After several conferences with the Internal Revenue Service, on November 23, 1962, appellant commenced the present action under Section 6213(a) of the Internal Revenue Code, 26 U. S. C. A. § 6213(a) (1954) in order to enjoin any such collection or attempted collection on the ground that appellee had not issued any deficiency letter pursuant to Section 6212 of the Internal Revenue Code, 26 U. S. C. A. § 6212 (1954) and that, because the claim filed by appellee in the receivership proceedings was never allowed, any collection under the authority of the assessments made in connection with the receivership proceedings would be invalid [R. 1, 37].

As shown by the record on this appeal, the following proceedings have taken place in this action: On November 23, 1962, upon *ex parte* application by appellant, the District Court duly issued a temporary restraining order, without notice, upon a cash bond, restraining appellee from collecting or attempting to collect the asserted deficiencies until November 26, 1962 [R. 1, 16, 19, 27, 33]. Prior to November 26, 1962, appellee was duly served with copies of the complaint, summons, motion for temporary restraining order, temporary restraining order, notice of motion for preliminary injunction and memorandum of points and authorities in support of motion for temporary restraining order and motion for preliminary injunction [R. 38, 39]. On November 26, 1962, appellant's motion for a

preliminary injunction to enjoin appellee from collecting or attempting to collect the asserted deficiencies was heard by the District Court. After arguments by counsel for appellant and appellee, the District Court ordered that the temporary restraining order was terminated, denied appellant's motion for a preliminary injunction and dismissed this action with prejudice [R. 46, 80]. No answer or affidavit or other pleading denying any of the allegations of the complaint was ever filed by appellee [R.]. Proposed findings of fact and conclusions of law and order were served and filed by appellee on December 6, 1962 [R. 46]. On December 11, 1962, objections to the proposed findings of fact and conclusions of law were served and filed by appellant [R. 40]. On December 12, 1962, the proposed findings of fact and conclusions of law were signed, without change, by the District Court and its order and judgment based thereon were entered [R. 46]. On January 8, 1963, appellant duly filed notice of appeal from the order and judgment, together with a cost bond on appeal [R. 51, 52]. On January 11, 1963, the District Court denied appellant's motion for an injunction to enjoin appellee from collecting the asserted deficiencies pending this appeal [R. 56, 58, 61, 72, 80].

On January 18, 1963, this Court, upon *ex parte* application by appellant, duly issued a temporary restraining order, without notice, upon a corporate surety bond, restraining appellee from collecting, or attempting to collect, the asserted deficiencies until the determination of a hearing set for February 4, 1963, in this Court. On February 4, 1963, based upon a written stipulation filed by appellant and appellee in this Court, this Court ordered said parties to maintain the *status quo* pend-

ing the final determination of this appeal. Pursuant to written stipulations of appellant and appellee filed in this Court on or about April 16, 1963, and May 20, 1963, this Court permitted appellant to file its opening brief on or before June 28, 1963.

### Specification of Errors.

#### I.

The District Court erred as a matter of law in failing to make the following findings of fact [R. 46, 47]:

A. That the assessments under which appellee threatens to collect the asserted deficiencies were made under Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954) relating to receivership proceedings;

B. That the only assessments ever made by appellee with respect to the asserted deficiencies were those made under Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954);

C. That no assessment with respect to the asserted deficiencies was ever made under Section 6213 of the Internal Revenue Code, 26 U. S. C. A. § 6213 (1954);

D. That no deficiency notice was ever given to appellant pursuant to Section 6212 of the Internal Revenue Code, 26 U. S. C. A. § 6212 (1954) with respect to the asserted deficiencies;

E. That the receivership court ordered the receiver to present to that court, for the court's adjudication, claims filed with the receiver between April 20, 1960, and October 20, 1960;

F. That the claim filed by appellee in the receivership proceeding was based upon assessments made under Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954). That this claim was never presented by the receiver to the court nor was said claim ever adjudicated by, or allowed by, the receivership court;

G. That the receivership proceedings were terminated on May 2, 1962, and appellee never appealed from the order or judgment terminating the receivership proceedings;

H. That appellant has exhausted all resort to administrative remedies;

I. That at all times from November 9, 1955, down to and including November 23, 1962, appellant has been financially solvent, owning at the commencement of this action approximately \$23,000.00 cash and real property worth approximately \$200,000.00 and having liabilities only of approximately \$74,000.00 for a bank loan and approximately \$23,000.00 for a note payable to its sole stockholder;

J. That unless immediately restrained from doing so, appellee threatens to use normal collection procedures to collect the asserted deficiencies under the purported authority of the assessments made under Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954);

K. That if appellee is permitted to collect the asserted deficiencies prior to any judicial determination of appellant's right to enjoin such collection, appellant will thereby suffer great and irreparable harm.

II.

The District Court erred as a matter of law in making Conclusion of Law Number 1 [R. 47] because this conclusion of law is inadequate in that it fails to state that the assessments referred to therein were made only under the provisions of Section 6871 of the Internal Revenue Code, 26 U. S. C. A. § 6871 (1954).

III.

The District Court erred as a matter of law in making Conclusion of Law Number 2 because this action by appellant is specifically permitted by the provisions of Section 6213 of the Internal Revenue Code, 26 U. S. C. A. § 6213 (1954) and by the provisions of Section 7421 of the Internal Revenue Code, 26 U. S. C. A. § 7421 (1954).

IV.

The District Court erred as a matter of law in making Conclusion of Law Number 3 because the District Court had jurisdiction of appellant's action brought under Section 6213 of the Internal Revenue Code, 26 U. S. C. A. § 6213 (1954).

V.

The District Court erred as a matter of law in refusing to hold that any collection or attempted collection of the asserted deficiencies by the appellee under the purported authority of the subject assessments would be invalid and illegal.

VI.

The District Court erred as a matter of law in refusing to restrain and enjoin appellee from attempting to collect, and from collecting, the asserted deficiencies

under the purported authority of the subject assessments.

VII.

The District Court erred as a matter of law in dismissing this action and in entering judgment for appellee.

Summary of Argument.

Appellant respectfully contends:

I.

The only facts in the record before this Court which bear upon the determination of the merits of this appeal are contained in the verified complaint of appellant.

II.

The proposed collection by appellee of the asserted income tax deficiencies is prohibited by the provisions of Section 6213(a) of the Internal Revenue Code (1954) because appellee never issued a notice of such deficiencies pursuant to Section 6212 of the Internal Revenue Code (1954) *unless*:

either

(a) the asserted deficiencies were assessed as jeopardy assessments pursuant to Section 6861 of the Internal Revenue Code (1954)

or

(b) the asserted deficiencies were assessed as immediate assessments pursuant to Section 6871 of the Internal Revenue Code (1954) in connection with a receivership proceeding involving appellant and a claim based thereon was filed in the receivership proceedings *and* presented to, adjudicated by, *and* allowed by, the receivership court.

III.

The proposed collection by appellee of the asserted deficiencies is not within either of the permissible exceptions to the prohibitive provisions of Section 6213(a) because:

- (a) the deficiencies asserted by appellee were not assessed as jeopardy assessments;

*and*

- (b) the deficiencies asserted by appellee:

- (1) were assessed as immediate assessments pursuant to the provisions of Section 6871 in connection with a receivership proceeding involving appellant and
- (2) a claim based thereon was filed by appellee in the receivership proceedings
- (3) *but* that claim was never presented to, adjudicated by, or allowed by, the receivership court.

IV.

**Conclusion.**

Accordingly, appellee has no authority or right under the Internal Revenue Code, or otherwise, to attempt to collect, or to collect, the asserted deficiencies.

Any attempted collection, or collection, by the appellee of these asserted deficiencies under the purported authority of the receivership assessments would be illegal and invalid.

Appellee should be permanently enjoined from attempting to collect and from collecting either of the asserted deficiencies.



ARGUMENT.

I.

The Only Facts in the Record Before This Court Which Bear Upon the Determination of the Merits of This Appeal are Contained in the Verified Complaint of Appellant.

On this appeal all of the allegations contained in the complaint must be accepted as true.

In rendering the order and judgment appealed from, the District Court apparently ruled that the complaint failed to state a claim upon which any relief could be granted to appellant and that the District Court did not have jurisdiction of the action [R. 46, 47, 48].

Where an action is dismissed, the allegations of the complaint must be viewed in a light most favorable to plaintiff, admitting and accepting as true all facts well pleaded.

*Sidebotham v. Robison*, 216 F. 2d 816 (C. C. A. 9th, 1954).

Where a complaint is dismissed for lack of jurisdiction and failure to state a claim on which relief could be granted, the allegations of the complaint must be taken as true.

*United States v. New Wrinkle, Inc.*, 72 S. Ct. 350, 342 U. S. 371, 96 L. Ed. 417 (1952);

*Guessefeldt v. McGrath*, 72 S. Ct. 338, 342 U. S. 308, 96 L. Ed. 342 (1952);

*Collins v. Hardyman*, 71 S. Ct. 937, 341 U. S. 651, 95 L. Ed. 1253 (1951);

*Hoffman v. Halden*, 268 F. 2d 280 (C. C. A. 9th, 1959);

*Yuba Consolidated Gold Fields v. Kilkeary*, 206 F. 2d 884 (C. C. A. 9th, 1953).

A motion to dismiss a complaint admits all well pleaded facts of the complaint, including those contained in attached affidavits or exhibits made a part thereof.

*Newport Industries v. Lake Charles Metal Trades Council*, 85 F. Supp. 517 (W.D. La. 1949) reversed on other grounds, 181 F. 2d 820 (C. C. A. 5th, 1950).

Allegations contained in the complaint and exhibits must be accepted as true on a motion to dismiss on grounds of lack of jurisdiction.

*Salvant v. Louisville & N.R. Co.*, 83 F. Supp. 391 (W.D. Ky. 1949).

## II.

Section 6213 of the Internal Revenue Code, 26 U. S. C. A. Section 6213 (1954), Generally Prohibits Any Collection of an Asserted Income Tax Deficiency Until a Notice of Such Deficiency Has Been Issued and Until the Ninety or One Hundred and Fifty Day Period Specified Therein Has Expired Unless Such Collection Is Within Either of the Two Exceptions Provided by Section 6861 and Section 6871 of the Internal Revenue Code, 26 U. S. C. A. Sections 6861, 6871 (1954).

The general rule with respect to Federal income taxes with which we are here concerned is that no assessment of a deficiency of any income tax and no levy or proceeding in court for its collection shall be made, begun or prosecuted until the written notice provided for by the provisions of Sections 6212 and 6213 of the Internal Revenue Code, 26 U. S. C. A. §§ 6212 and 6213 (1954) has been mailed to the taxpayer and at

least until after the expiration of the 90-day or 150-day period specified therein.

Section 6213(a) of the Internal Revenue Code, 26 U. S. C. A. § 6213(a) (1954).

In this case no 90-day notice was ever issued by appellee to appellant [R.].

The Internal Revenue Code, 26 U. S. C. A. (1954) specifically provides that a levy in contravention of the provisions of Section 6213 of the Internal Revenue Code, 26 U. S. C. A. § 6213 (1954) may be enjoined by a proceeding in the proper court brought by the taxpayer.

Section 6213(a) of the Internal Revenue Code, 26 U. S. C. A. § 6213(a) (1954);

Section 7421(a) of the Internal Revenue Code, 26 U. S. C. A. § 7421(a) (1954).

There are, however, two exceptions to this prohibition of Section 6213(a):

- (a) Section 6861 of the Internal Revenue Code, 26 U. S. C. A. § 6861 (1954) expressly permits what are commonly referred to as "jeopardy assessments" to be made in certain situations without requiring that the 90-day notice of deficiency be issued

and

- (b) Sections 6871, 6872 and 6873 of the Internal Revenue Code, 26 U. S. C. A. §§ 6871, 6872 and 6873 (1954) dealing with bankruptcies and receiverships expressly provide for:

- (1) The immediate assessment of a determined deficiency in a receivership proceeding,  
Section 6871(a)

- (2) The filing and presentation of the claim for such deficiency “. . . for adjudication in accordance with law, in the Court before which the . . . receivership proceeding is pending.”

Section 6871(b)

and

- (3) The payment by the taxpayer after the termination of the receivership proceeding, of “. . . any portion of the claim for taxes *allowed* in a receivership proceeding . . .” (Italics added.)

Section 6873(a)

### III.

**The Proposed Collections by Appellee of the Asserted Deficiencies are not Within Either of the Permissible Exceptions to the Prohibitive Provisions of Section 6213 of the Internal Revenue Code, 26 U. S. C. A. Section 6213 (1954).**

The proposed collections by appellee of the asserted deficiencies are not within the first such exception to the prohibitive provisions of Section 6213 because the assessments involved in this case were not intended to be, and were not, jeopardy assessments.

Regulations, Section 301.6871(b)-1(c).

The proposed collections by appellee of the asserted deficiencies are not within the second such exception to the prohibitive provisions of Section 6213 for the following reasons:

In this case, appellee *did* file a purported claim for the deficiencies, assessed by him under Section 6871, in the receivership proceeding [R. 4, 10, 11]. But this purported claim by the appellee was *never presented* to the court, was *never adjudicated* by the court and was *never allowed* by the court [R. 4, 5].

The court, state or federal, which has jurisdiction of such a receivership proceeding has *exclusive jurisdiction* with respect to the adjudication of the validity of a claim for taxes filed therein by the United States.

*Merryweather v. United States*, 12 F. 2d 407  
(C. C. A. 9th, 1926).

Section 6871 of the Internal Revenue Code denies to a taxpayer in receivership the normal remedy of filing a petition in the Tax Court for redetermination of a deficiency prior to payment of the deficiency. However, Section 6871 of the Internal Revenue Code only permits the assessment to be made thereunder in order to allow the filing of a claim for the asserted deficiency in the receivership proceedings. Thus, when, and only when, this procedure is properly prosecuted to a conclusion by the Director of Internal Revenue is the taxpayer accorded the right to a judicial determination by the receivership court as to the correctness of the asserted deficiency prior to any payment of the same. Here the Director did nothing but file the claim.

The filing and prosecution of a claim in a receivership proceeding is a proceeding ancillary to the jurisdiction acquired by the receivership court between the original parties. The claimant, upon filing his claim, becomes a party to the ancillary proceeding and any

order which may be entered adjudicating any such claim, and, if aggrieved, may ask for a review.

*Alexander v. Hillman*, 296 U. S. 222 (1935);  
*Stewart v. Dunham*, 115 U. S. 61, 64 (1885);  
*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642 (C. C. N. D. Ohio, 1897);

*Hobart v. Hobart*, 86 N. Y. 636 (1881);

3 Clark, *Receivers*, Section 649 (3rd Ed. 1959).

A receiver is not appointed for the benefit merely of the plaintiff on whose application the appointment is made but for the equal benefit of all persons who may establish rights in the case. The receiver is *not* the plaintiff's agent. The receiver is equally the representative of all parties in his capacity as an officer of the court.

High, *Receivers*, 208, note 3 (4th Ed. 1910)  
citing:

*McLeod v. City of New Albany*, 66 Fed. 378  
(C. C. A. 7th, 1895)

and

*Halsted v. Forest Hill Co.*, 109 Fed. 820  
(C. C. D. W. Va., 1901).

In the *Halsted* case where a creditor through his own negligence failed to cause his claim to be presented and where the report of the receiver was approved and the assets distributed without allowing that creditor's claim, such claim was held to be barred.

See also: *United States v. Crocker*, 63-1 U. S. T. C. ¶9304 (C. C. A. 9th), holding that a court appointed receiver is an officer of the court which appointed him

and does not act primarily as a representative of the parties.

The order of the receivership court terminating the receivership proceeding without allowing the claim of appellee was appealable.

*Hibernia Sav. & Loan Soc. v. Ellis Estate Co.*,  
216 Cal. 280 (1932);

*Fish v. Fish*, 216 Cal. 14 (1932);

*Title Insurance and Trust Co. v. California Development Co.*, 159 Cal. 484 (1911);

*Los Angeles v. Los Angeles City Water Co.*,  
134 Cal. 121 (1901).

The appellee did not prosecute his claim in the receivership proceedings. Furthermore, the appellee never sought any review of the failure of the receivership court to act upon, adjudicate or allow his claim, whether by appeal or otherwise [R. 4]. Rather, on October 4, 1962, some five months after the receivership proceeding had been terminated, appellee commenced his threats to collect the asserted deficiencies by levy and distraint [R. 5]. At that late date, even assuming *arguendo* that the judgment of the receivership court had been entered through appellee's mistake, inadvertence, surprise or excusable neglect, appellee still could have applied to the receivership court on that ground to reconsider its judgment.

Section 473 of the California Code of Civil Procedure.

However, no such ground has been shown and no such application was made [R.]. Rather, appellee asserted the position that he could collect the asserted deficiencies even though his claim therefore was not allowed by the Receivership Court [R. 5, 6].

But the Internal Revenue Code *nowhere* provides for the collection of such a claim for taxes which is *not allowed* in a receivership proceeding.

Internal Revenue Code, 26 U. S. C. A. (1954).

Section 6873 of the Internal Revenue Code, 26 U. S. C. A. § 6873 (1954) which relates to the payment of tax claims *allowed* in a receivership proceeding provides as follows:

“Any portion of a claim for taxes *allowed in a receivership proceeding . . .* which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding.” (Italics added.)

Accordingly, the provisions of Section 6873 of the Internal Revenue Code are no authority for what appellee seeks to do. Nor is there any other provision in the Internal Revenue Code or the Regulations thereunder which authorizes what appellee seeks to do. On the contrary, Regulations, Section 301.6873-1(b) does not permit the collection of any item of an assessment which is included in a claim filed in a receivership proceeding unless that claim has been allowed by the receivership court.



**Conclusion.**

Inasmuch as the proposed collection by appellee of the asserted deficiencies

*is*

squarely within the basic prohibitive injunctive provisions of Section 6213(a)

*and is not*

within the jeopardy assessment exception to this basic injunctive provision

*and is not*

within the receivership assessment exception to this basic injunctive provision,

appellant respectfully submits

that:

appellee has no authority to collect the asserted deficiencies,

that

any collection, or attempted collection by appellee of the asserted deficiencies under the purported authority of the receivership assessments would be illegal and invalid

and that

appellee should be enjoined, pursuant to the provisions of Section 6213(a) from collecting, or attempting to collect, either of the asserted deficiencies.

Respectfully submitted,

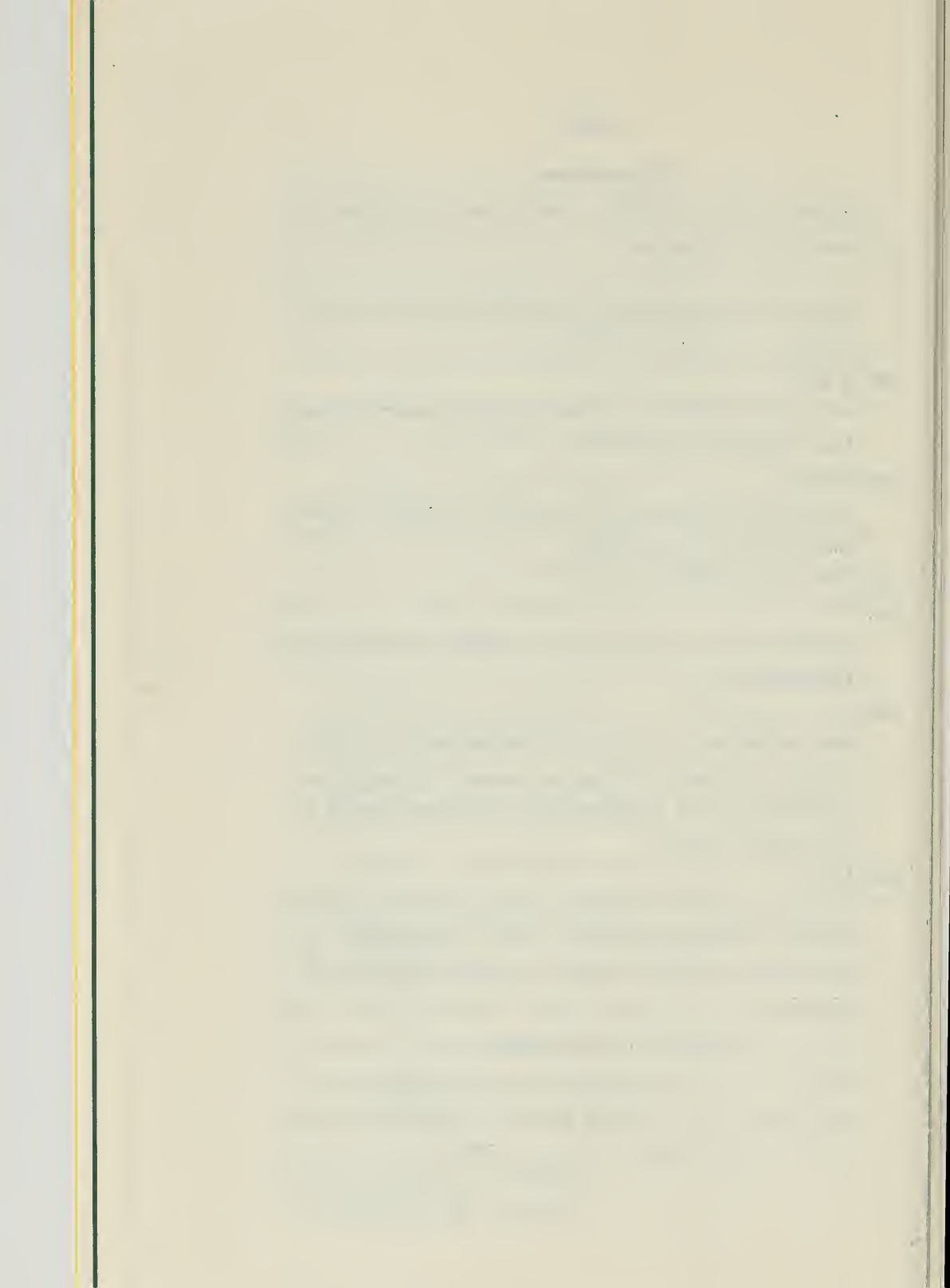
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**Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER J. McLELLAN

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